APPENDIX.

(From pages 27 through 33 of the printed Transcript.)

Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1. Plaintiff, Ben Hur Coal Company, is an Oklahoma corporation with its principal place of business at Henryetta, Oklahoma. Defendants, Earl Wells and M. A. Berman, are partners doing business under the name of Starr Coal Company. Defendants reside at Henryetta, Oklahoma, which is within the Eastern District of Oklahoma.

2. This cause arises under the laws of the United States and involves an amount in excess of $3,000.

3. Both plaintiff and defendants are engaged in mining for coal and in preparation of coal for industrial, commercial, and domestic markets. Each party operates a mine at Henryetta, Oklahoma, from which coal is produced and sold in carload lots to industrial users, jobbers, wholesalers, and others, including purchasers of sized coal for domestic use. The parties have competed with each other, and with other producers of coal, for many years.

4. Under the evidence, the operations of the plaintiff were limited to the sale of domestic coal with the exception of one year, 1953, when it sold 25,000 tons of industrial coal. The defendants, beginning in 1951, have sold not only domestic coal but industrial coal, and in 1953 and 1954 their operations included more tons of industrial coal than it did of domestic coal. On the other hand, the defendants have each year sold more domestic coal than the plaintiff sold. The evidence discloses that the cost of producing industrial coal is less than the cost of producing domestic coal, consequently, the defendants were able to operate at a greater profit by reason of combining industrial coal and domestic coal.

5. In an effort to sustain its contention that the defendants were selling domestic coal at a loss, plaintiff produced the testimony of an accountant who had made a complete audit of the defendants' books. In making this audit, the accountant separated the domestic coal from the industrial coal and made an entirely different cost analysis based upon an accounting method of his own, and according to his testimony he came out with a loss of approximately $2,800 on the domestic coal sold by the defendants in the last year of operation prior to the trial of the case. The accounting methods used were seriously challenged by an accountant representing the defendants, and the Court is of the opinion that the plaintiff did not succeed in establishing by a preponderance of the evidence that the defendants sold domestic coal below their cost of production. One of the first contentions of the plaintiff was to the effect that, except for the favorable industrial coal contract, the defendants would have operated at a loss.

6. The evidence discloses that the coal industry is, and has always been, highly competitive. Apparently, in the Henryetta field coal operators had, prior to the trouble that arose between plaintiff and the defendants, discussed prices and other matters relating to the industry and had, in effect, agreed upon the price at which the coal would be sold. The evidence would indicate that, for a time at least, competition was eliminated between the operators. The first rift that came between the plaintiff and the defendants occurred in 1949 when the Henryetta coal field was having labor troubles. The Ben Hur people were negotiating with the unions in regard to a new contract. While the negotiations were at a standstill, plaintiff concluded that for its interest it should meet the requirements of the union. It advised the defendant company that it thought it should do that. The defendants insisted that they would not. The result was that the plaintiff signed a contract with the union on the theory that the best interests of its business required that it do so.

7. The evidence further shows that John T. Cole, of Okmulgee, Oklahoma, owned or has a controlling interest in practically all of the valuable coal property in the Henryetta field. The defendants had a lease from Cole on 120 acres of very valuable coal deposits, which lease expired on March 1, 1953, by reason of failure to begin operations prior thereto. The defendants allowed their lease on this land to expire. Cole entered into a contract with the plaintiff in regard to the 120 acres. The defendants were disappointed, but admitted that the Ben Hur Company had done nothing out of line. This situation left the defendants with a relatively small amount of acreage yet to be mined, and the proof shows that the only remaining mine which the defendants owned will be mined out in the early part of 1956 and the defendants will be out of the coal business unless they acquire additional property, and apparently there is no additional property in that area. In the trial of the case defendants expressed a wish to get out of the coal business as soon as the present mine they are operating is exhausted.

8. The proof clearly showed that during the time that relations between the two competing companies were strained, the problems of the coal industry became more acute, and probably most of the operators were concerned with their ability to survive. It was during this time that the defendants, through a business connection with the Sheffield Steel Company, obtained a favorable contract for industrial coal from that company. The larger volume of coal which the defendants have been able to produce and sell has afforded the defendants a more favorable economic situation than that of the plaintiff. It is the Court's opinion that the actions taken by the defendant company were motivated by sound economical considerations and without regard to the situation that confronted the plaintiff.

9. The demand for coal for domestic fuel purposes has declined steadily since World War II, both in Oklahoma

and throughout the United States. Many mines in Oklahoma have been forced to close. Of the thirty-six mines originally located in the Henryetta field, only the two belonging to plaintiff and defendants were operating at the time of this action.

10. By reason of competition with other fuels, especially natural gas, and because of freight differentials favoring coals from other areas, the market of both parties is now primarily limited to an area which includes parts of Missouri, Nebraska, Iowa, Minnesota, and South Dakota.

11. Within this market area, Henryetta coal competes with the domestic product of mines in Rogers County, Oklahoma (Catoosa coal), Southern Illinois, Western Kentucky, and elsewhere. While the competition between these coals is substantially affected by such factors as relative quality, efficiency in processing, and comparative freight rates, the market is also sensitive to price changes.

12. Following the removal of wartime price restrictions, and prior to 1953, the general trend of prices for domestic sizes of coal, in the relevant market, was upward.

13. Beginning in the spring of 1953, and continuing to the date of trial, the trend of competitive prices for domestic coal in the relevant market has been generally downward.

14. In October, 1952, the price of Henryetta domestic coal produced by the mines of both parties increased by eight-five cents per ton to a total of $7.35 per ton f.o.b. mine, which was the highest price reached by Henryetta coal at any relevant time.

15. The mine prices of domestic coal from Southern Illinois, Western Kentucky, and Catoosa followed this rise in the Henryetta coal shortly after it was made, but did not increase proportionately.

16. In the late winter of 1952-53 and the spring of 1953, the mine prices of domestic coals from Southern Illinois and Western Kentucky were reduced.

17. On November 1, 1953, defendants reduced the mine price of their domestic sizes of coal from $7.35 to $6.50.

18. The price of Southern Illinois and Western Kentucky domestic coals were reduced again in the spring of 1954 to levels which have never been reached by the Henryetta domestic coal prices.

19. On June 1, 1954, after the 1954 reductions by the Southern Illinois and Western Kentucky mines, defendants reduced their price for domestic coal to $6.00 per ton.

20. While the Henryetta price of $7.35 per ton was in force, defendants received complaints from some of their wholesale customers that defendants' price was too high and that some retail customers were being lost.

21. While the Henryetta price of $7.35 per ton was in force, plaintiff from time to time made special price concessions below the Henryetta list price to certain of its customers. Some of the defendants' wholesalers protested to defendants concerning plaintiff's conduct.

22. Continuous operation of a coal mine is necessary to its profitable operation. Intermittent operation results in low efficiency and an increase in the unit cost of the coal produced. Continuous operation is possible only with sales volume equal to or in excess of efficient daily production. Volume of sales is directly reflected in unit costs, and in both unit and gross profits of a coal mining enterprise. Savings in unit cost, effected by increases in volume, are reflected over the entire produce of the mining operation. A minimum of volume is essential to any profit at all.

23. In October of 1953, which was the month preceding the first of the accused price reductions, and was the last month of the mine price of $7.35, defendants' volume of sales had declined below their efficient production capacity, their tracks were crowded with loaded but unsold cars of coal, they had few orders in prospect for November, and they were faced with shutdown of their mine.

24. After defendants reduced their domestic coal price to $6.50 per ton on November 1, 1953, defendants were able to dispose of all unsold domestic coal on hand; their volume of sales improved substantially; their mine was able to maintain regular and continuous operations; and defendants enjoyed substantial profits.

25. During the period following June 1, 1954, when defendants further reduced their domestic coal price to $6.00 per ton, defendants' sales volume again increased.

26. Defendants' unit costs for the production of all their product declined in response to the increases in volume which followed their price reductions.

27. Defendants' profits increased over the full period of the reduced prices, both in total profits for all kinds of coal and in the separate category of domestic coal.

28. In making the two price reductions accused as unlawful in this action, defendants were motivated by business considerations, including shrinkage of the competitive market, decline in the prices of immediate competitors, pressure of their wholesale customers for reduction, plaintiff's special prices below its list price, desire and necessity to maintain existing volume of production, desire to recover and retain individual customers previously lost to competitors, and a desire to maintain and increase their profits.

29. In making their price reductions, defendants were not motivated by malice or by an intent to injure or destroy competition, or by an intent to injure or destroy the plaintiff.

30. The accused prices of defendants were not low in relation to competitive prices for like products. Defendants' prices were always higher than those of like coal from Southern Illinois and Western Kentucky, their chief competitors in their limited market area.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and of the subject matter of this action.

2. Defendants' prices for domestic coal of $6.50 and $6.00, f. o. b. their mine, were not unreasonably low within the intent and meaning of Section 3 of the Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, and did not transgress nor violate its terms.

3. The evidence is insufficient at law to establish the cause pleaded in plaintiff's complaint.

4. Plaintiff should take nothing upon its complaint, and plaintiff's cause should be dismissed upon the merits.

5. Defendants should have and recover their costs. The attorney for the defendants is requested to prepare a decree in conformity with the foregoing findings of fact and conclusions of law and present the same to the Court for signing and entry at Muskogee, Oklahoma, on March 12th, 1956.

Entered this 2nd day of March, 1956.

EUGENE RICE, Judge.

Filed March 2, 1956.